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Skrine & Co v MBf Capital Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–27 OF 1998
GOPAL SRI RAM, AHMAD FAIRUZ AND HAIDAR JJCA
18 JUNE 1998

B

Civil Procedure *— Costs — Security for costs — Application for — Whether there was reason to award defendant security for costs against plaintiff company — Test to be applied — Companies Act 1965 s 351(1)*

C ***Civil Procedure*** *— Damages — General damages — Quantification of damages — Whether plaintiff in defamation action may quantify his damages — Whether plaintiff could receive anything more than amount stipulated in his writ*

Civil Procedure *— Particulars — Application for further and better particulars — Whether necessary to file affidavit in support — Whether court should allow application*

D

Civil Procedure *— Trial — Preliminary issue — Whether issue as to liability of partners in a partnership ought to be tried as a preliminary issue — Test to be applied — Rules of the High Court 1980 O 77 r 4(4)*

E ***Civil Procedure*** *— Pleadings — Amendment of defence — Whether amendment would introduce a new plea — Whether discretion of trial judge to refuse amendment was exercised wrongly — Whether interrogatories pertaining to the amended defence ought to be allowed*

F There are ten appeals before the court. They arose out of same civil suit and involved a review of discretion exercised by the judge in the court below. The plaintiffs had claimed in the court below that the first defendant had defamed them and that the second defendant firm is vicariously liable for the alleged tort committed by the first defendant. Both in the indorsement in the writ and in the statement of claim, the plaintiffs quantified the damages for a total claim of G RM60m against the first and second defendants.There were several applications made to the judge periodically seeking several types of interlocutory relief which form the subject matter of the appeals before this court. The appeals are against: (i) an order refusing applications requiring the plaintiffs to furnish security for costs; (ii) an order refusing to strike out the quantification of damages H appearing at the foot of the writ and statement of claim; (iii) the judge's refusal to order the plaintiffs to furnish particulars of their pleadings — there being no affidavit filed in support of the application for particulars; (iv) the judge's orders declining to try preliminary issues, as to liability of a partner and of the firm respectively; (v) the I judge's refusal to allow amendments sought by the first defendant to his defence; and (vi) an order of the judge granting the plaintiffs leave to interrogate the first defendant in the action.

Held:

(1) Section 351(1) of the Companies Act 1965 provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company; ie the court has to determine (i) whether there is credible evidence; and (ii) whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

In this case, the learned judge had applied the correct legal test to the evidence made available to him. Admission of further evidence would not, in this case, have the effect of creating a reason to believe that the first plaintiff will not be able to satisfy an order for costs in the event of it failing in the litigation in question. Therefore, the appeals that deal with the question of security for costs must fail (see pp 657I, 658A–B and 659E–H).

(2) It is incorrect to say that there was once a practice of quantifying general damages but that it has since fallen into disuse and that it would be quite wrong to reinstate it. There is no rule of practice going either way. A plaintiff in a defamation action may quantify his damages, in which event he runs the risk of not receiving anything more than the amount stipulated in his writ. However, he is equally at liberty not to specify a sum in which event arguments may be addressed in the usual way at the conclusion of the trial upon that issue. In either case, it is the court that makes the determination (see p 661E–G).

Moreover, the courts must keep in tandem with the legislature by permitting the quantification of damages and thereby stop in their tracks would be publishers of false information. Such deterrence is in keeping with the spirit and intendment of art 10(1)(a) of the Federal Constitution and is not contrary to it (see p 662E)

(3) Whilst it may be necessary in particular cases for an affidavit to be filed in support of an application for particulars, it is not *a sine qua non*. There may be cases where the particulars asked for are so obviously necessary that an affidavit may be superfluous. It all depends on the facts of each case. Therefore, it is not a universal rule that for every application for further and better particulars there *must* be an affidavit in support.

Moreover, the learned judge had completely overlooked the fact that there was another affidavit by a partner of the firm, filed in opposition to an affidavit in reply by the plaintiffs. That affidavit certainly advanced sufficient reasons why the particulars sought for ought to be had. In this case, some of the particulars were patently necessary and relevant. Such particulars, as conceded by the plaintiffs, ought to be allowed. However, the particulars which relate to evidence and not to facts are disallowed (see p 663C, D, F–G).

(4) Order 77 r 4(4) of the Rules of the High Court 1980 obviously reserves in a judge a discretion as to the manner and the time at which an issue upon a partner's liability may be separately determined. The learned judge who heard the application is in the best position to determine how conveniently the trial should be proceeded with. It is a matter upon which individual judges may differ. It is wrong to think that the paramount consideration is the partner's inconvenience. It is the inconvenience which would be caused to all parties that is relevant. Above all, it is for the trial judge to determine how and when issues ought to be tried; whether as preliminary matters or together with the main action. Therefore, this court is not inclined to disturb the decision of the judge. Indeed, it will be most inconvenient to have the trial conducted in bits and pieces (see p 670F, G).

(5) The judge was wrong when he held that the amendments to the defence had introduced a new plea. They merely explain or expand within permitted limits the case already pleaded by the first defendant. Though this is an appeal against the exercise of discretion, this court opined that the discretion was wrongly exercised because the judge did not appreciate the true nature and scope of the proposed amendments. The appeal must be allowed (see pp 672A and 673B).

Taking into account the amendments the court had permitted to the first defendant's defence, the interrogatories sought are not only desirable but have become essential. The learned judge was correct in ordering them (see p 674D).

Per curiam:

It is not necessary that a company must be readily possessed of cash in order to satisfy a court that it is in a position to pay the costs of an action brought by it in the event of failure. Suffice that the court is satisfied upon credible testimony, that is to say evidence that instils belief in the mind of the court after critical examination of it, that a corporate plaintiff is in a position to satisfy an allocatur by attachment upon its assets (see pp 659I and 660A)

[Bahasa Malaysia summary

Terdapat sepuluh rayuan di hadapan mahkamah yang timbul daripada guaman sivil yang sama dan melibatkan kajian semula budi bicara yang dilaksanakan oleh hakim di mahkamah bawah. Plaintif-plaintif telah menuntut di mahkamah bawah bahawa defendan pertama telah memfitnah mereka dan bahawa defendan kedua adalah bersalah secara vikarius untuk tort yang dikatakan dilakukan oleh defendan pertama. Dalam kedua-dua pengindorsan dalam writ dan pernyataan tuntutan, plaintif-plaintif menjumlahkan tuntutan sebanyak RM60 juta terhadap defendan pertama dan kedua. Terdapat beberapa

permohonan yang dibuat kepada mahkamah secara berkala menuntut beberapa jenis relief interlokutori yang membentuk perkara subjek rayuan-rayuan di hadapan mahkamah ini. Rayuan-rayuan itu adalah terhadap: (i) perintah menolak permohonan yang menghendaki plaintif-plaintif menyediakan jaminan kos; (ii) perintah menolak untuk membatalkan penaksiran ganti rugi yang terdapat di nota kaki writ dan pernyataan tuntutan; (iii) penolakan hakim untuk memerintahkan plaintif menyediakan butir-butir pliding — tidak ada afidavit difailkan untuk menyokong permohonan untuk butir-butir; (iv) perintah hakim yang menolak untuk membicarakan isu-isu permulaan, berkenaan dengan liabiliti rakan kongsi dan firma masing-masing; (v) penolakan hakim untuk membenarkan pindaan yang dipohon oleh defendan pertama untuk meminda pembelaannya; dan (vi) perintah hakim membenarkan plaintif-plaintif menyoal siasat defendan pertama dalam tindakan itu.

Diputuskan:

(1) Seksyen 351(1) Akta Syarikat 1965 memperuntukkan dua langkah penyiasatan dalam proses untuk mencapai kesimpulan sama ada jaminan kos patut diawardkan dalam kes tertentu di mana plaintif adalah sebuah syarikat; iaitu mahkamah perlu menentukan: (i) sama ada terdapat bukti yang boleh dipercayai; dan (ii) sama ada bukti itu, apabila didapati boleh dipercayai, menyokong kepercayaan bahawa syarikat tidak berupaya untuk membayar kos defendan yang berjaya.

Dalam kes ini, hakim yang bijaksana telah menggunakan ujian undang-undang yang betul kepada keterangan yang terdapat di hadapannya. Penerimaan keterangan lanjut tidak akan, dalam kes ini, mempunyai kesan memberi alasan untuk mempercayai bahawa plaintif pertama tidak berupaya untuk mematuhi perintah untuk kos jika ia gagal dalam litigasi berkenaan. Oleh itu, rayuan-rayuan berkenaan dengan jaminan kos mesti gagal (lihat ms 657I, 658A–B dan 659E–H).

(2) Adalah tidak betul untuk mengatakan terdapat amalan satu ketika dahulu yang menaksirkan ganti rugi umum tetapi sekarang ia telah tidak digunakan dan bahawa adalah salah untuk menggunakannya semula. Tiada peraturan amalan sedemikian yang digunakan. Plaintif dalam tindakan fitnah boleh menaksirkan ganti ruginya, dengan risiko tidak menerima apa-apa yang lebih daripada apa yang ditetapkan dalam writnya. Bagaimana pun, dia juga bebas untuk tidak menetapkan jumlah di mana hujah dikemukakan seperti biasa pada penamatan perbicaraan atas isu tersebut. Dalam mana-mana kes, mahkamah yang membuat penentuan (lihat ms 661E–G).

Tambahan pula, mahkamah mesti berada seiring dengan badan perundangan dengan membenarkan penaksiran ganti rugi dan dengan itu pemberhentiannya secara tiba-tiba akan mengeluarkan maklumat salah. Pencegahan sedemikian adalah

A seiring dengan semangat dan hasrat perkara 10(1)(a) Perlembagaan Persekutuan dan tidak bertentangan dengannya (lihat ms 662E).

(3) Sementara dalam kes tertentu adalah perlu untuk memfailkan afidavit untuk menyokong permohonan untuk butir-butir, ianya B bukan *sine qua non*. Mungkin terdapat kes-kes di mana butir-butir yang dipohon adalah dengan jelasnya perlu sehinggakan afidavit mungkin menjadi tidak perlu. Semuanya bergantung kepada fakta-fakta setiap kes. Oleh itu, bukannya peraturan umum bahawa setiap permohonan untuk butir-butir lanjut *mesti* terdapat afidavit sokongan.

C Tambahan pula, hakim yang bijaksana telah terlepas perhatian hakikat bahawa terdapat afidavit lain oleh rakan kongsi firma tersebut, yang difailkan menentang afidavit jawapan oleh plaintif-plaintif. Afidavit itu pastinya memberikan alasan-alasan yang mencukupi bahawa butir-butir yang dipohon mesti diberikan. D Dalam kes ini, butir-butir itu adalah dengan jelasnya perlu dan relevan. Butir-butir sedemikian, seperti yang dipersetujui oleh plaintif-plaintif, patut dibenarkan. Bagaimana pun, butir-butir yang berkaitan dengan keterangan dan bukan fakta tidak dibenarkan (lihat ms 663C, D, F–G).

E (4) Aturan 77 k 4(4) Kaedah-Kaedah Mahkamah Tinggi 1980 dengan jelas memberikan budi bicara kepada hakim berkaitan dengan cara dan masa sesuatu isu berkenaan liabiliti rakan kongsi boleh ditentukan secara berasingan. Hakim yang bijaksana yang mendengar permohonan berada dalam kedudukan yang terbaik untuk menentukan bagaimana perbicaraan itu patut diteruskan F dengan cara yang mudah. Ia adalah satu perkara di mana hakim-hakim secara individunya mempunyai pendapat yang berbeza. Adalah salah untuk mengatakan bahawa pertimbangan yang paling utama adalah kesusahan rakan kongsi. Apa yang relevan ialah kesusahan yang boleh disebabkan ke atas semua pihak. Yang G paling utama ialah, hakim akan menentukan bagaimana dan bila isu-isu patut dibicarakan; sama ada sebagai perkara permulaan atau bersama dengan tindakan utama. Oleh itu, mahkamah ini tidak berhasrat untuk mengganggu keputusan hakim itu. Malahan, sangat menyusahkan untuk menjalankan perbicaraan secara H berasingan (lihat ms 670F, G).

(5) Hakim adalah salah apabila beliau memutuskan bahawa pindaan kepada pembelaan telah memperkenalkan pliding baru. Pindaan itu cuma menjelaskan atau melanjutkan dalam had yang dibenarkan kes yang telahpun diplidkan oleh defendan pertama. I Walaupun ini adalah satu rayuan terhadap pelaksanaan budi bicara, mahkamah ini berpendapat bahawa budi bicara dilaksanakan dengan salah kerana hakim tidak mengambil kira bentuk dan skop sebenar pindaan yang dicadangkan itu. Rayuan itu mesti dibenarkan (lihat ms 672A dan 673B).

Mengambil kira pindaan kepada pembelaan defendan pertama yang mahkamah telah benarkan, soal siasat yang dipohon bukan sahaja perlu tapi penting. Hakim yang bijaksana adalah betul dalam membuat perintah itu (lihat ms 674D).

Per curiam:

Adalah tidak perlu bahawa sesebuah syarikat mesti mempunyai wang yang tersedia untuk memuaskan hati mahkamah bahawa ia boleh membayar kos tindakan yang dimulakan olehnya jika tindakan itu gagal. Adalah mencukupi bahawa mahkamah berpuas hati atas testimoni yang boleh dipercayai, iaitu keterangan yang memberikan kepercayaan dalam fikiran mahkamah selepas pemeriksaan yang kritikal, bahawa plaintif korporat adalah dalam kedudukan untuk memenuhi alokatur melalui penahanan ke atas aset-asetnya (lihat ms 659I dan 660A).]

Notes

For cases on security for costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1338–1369.

For cases on general damages, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1488–1491.

For cases on further and better particulars, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3216–3227.

For cases on preliminary issue, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4926–4928.

For cases on amendment of defence, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3445–3455.

Cases referred to

Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal [1995] 2 MLJ 620 (refd)

Carmen Proetta v Times Newspapers Limited (CA, 27 February 1991)

Dalgleish v Lowther [1899] 2 QB 590 (refd)

Edelman v Times Newspapers Limited & Anor (CA, 17 January 1991)

Feeney v Rix [1968] Ch 693 (refd)

Gula Perak Bhd v Agri-Projects (M) Sdn Bhd [1989] 1 MLJ 422 (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)

Kalvin Cader Mackenzie v Business Magazines (UK) Ltd & Ors (CA, 18 January 1996) (refd)

Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189 (refd)

Palmos & Anor v Georgeson [1961] Qd R 186 (refd)

Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] QB 609 (refd)

Thomas Michael Bower v Ian Robert Maxwell (CA, 8 May 1989) (refd)

Turner v Dalgety & Co Ltd (1952) 69 WN (NSW) 228 (refd)

Legislation referred to

Companies Act 1965 s 351(1)
Federal Constitution arts 10(1)(a), (2)(a)
Printing Presses and Publications Act 1984 s 8A
Rules of the High Court 1980 O 77 r 4(4)

VK Lingam (*V Sivaparanjothi, W Satchithanandhan* and *R Thayalan* with him) (*V Siva & Partners*) for the plaintiffs.

Raja Aziz Addruse (*Darryl SC Goon, Robyn Choi* and *Raja Eileen Soraya*) (*Raja Darryl & Loh*) for the first defendant.

C Abraham (*RS Nathan* and *G Rajasingam* with him) (*Shearn Delamore & Co*) for the second defendant.

Porres Royan (*Zainur Zakaria* and *Eugene Jeyaraj* with him) (*N Navaratnam & Co*) for K Anantham.

Gopal Sri Ram JCA (delivering oral judgment of the court):

Introduction

Thirteen appeals came before us when we commenced hearing on Tuesday, 16 June 1998. Of these, three have been withdrawn. Ten now remain upon which we are required to pronounce our decision and give our reasons.

All ten appeals have two things in common. First, they arise out of same civil suit; second, almost all of them involve a review of discretion exercised by the judge in the court below. Some of these appeals have common subject matter and were, therefore, heard together. The particulars of the appeals are as follows:

(1) Civil Appeal Nos W–03–27–98, W–02–301–98 and W–03–313–98, all of which are directed against the learned judge's order refusing applications requiring the respondents before us to furnish security for costs.

(2) Civil Appeal No W–02–459–97 which is an appeal against the order of the learned judge refusing to strike out the quantification of damages appearing at the foot of the writ and statement of claim (see [1997] 3 MLJ 403).

(3) Civil Appeals No W–03–4–98 and W–03–5–98 which are directed against the learned judge's refusal to order the plaintiffs to furnish particulars of their pleadings (see [1998] 3 MLJ 216).

(4) Civil Appeals No W–03–40–97 and W–03–6–98 which are directed against the learned judge's orders declining to try preliminary issues, as to liability of a partner and of the firm respectively, made under the relevant provisions of the Rules of the High Court (see [1998] 3 MLJ 226).

(5) Civil Appeal No W–03–303–98 in which the complaint is that amendments sought by the first defendant, Mr Tommy Thomas, a partner of the second defendant firm, to his defence in the court below were wrongly refused by the judge.

(6) Civil Appeal No W–02–302–98 which is an appeal directed against the order of the learned judge granting the plaintiffs (respondents before us) leave to interrogate the first defendant in the action.

Background

The brief background to all the foregoing appeals may be shortly stated. We may, add that for the purposes of this judgment, we will be referring to the parties according to the title assigned to them in the court below. The first plaintiff is a public listed company and the second plaintiff is its wholly owned subsidiary.

There is a magazine called 'International Commercial Litigation'. In the November 1995 issue of that magazine, there appeared an article about the Malaysian judiciary. It was written by one David Samuels. It contains references to several cases litigated before our courts. One of these cases involved the plaintiffs. On publication of the article, the plaintiffs took umbrage with its contents. They formed the view that it libelled them. The article in question has references also to interviews and statements by both named and unnamed persons. The first defendant is mentioned in the article and words alleged to be spoken by him appear in quotations. On 25 September 1996 the plaintiffs issued writ, both against the first defendant and the firm of solicitors of which he is a partner (the second defendant in the action). In the statement of claim, the plaintiffs complained that the first defendant had defamed them and that the second defendant firm is vicariously liable for the alleged tort committed by the first defendant. Both in the indorsement in the writ and in the statement of claim, the plaintiffs quantified the damages. Each of them claimed a sum of RM30m for slander and libel, that is to say, a total claim of RM60m against the first and second defendants.

After the defendants had delivered their defences and the plaintiffs their reply, a summons for directions was filed by the plaintiffs. However, the learned judge to whom the action was assigned declined to make orders or give directions on that summons. Instead, he subjected the action to case management, a process by which he supervised the conduct of all proceedings therein.

At one of the pre-trial conferences held in January 1998, the learned judge indicated that the trial of the action will commence in May 1998. Thereafter, applications were made to him periodically seeking several types of interlocutory relief which form the subject matter of the appeals now before us.

So much for the background.

For convenience, we will now deal with the appeals according to the subject matter to which they pertain.

The security for costs appeals

By two summonses taken out on 22 April 1998 and 2 May 1998, the second defendant firm (other than the first defendant and two other

A partners, namely, Dato' Ranita bte Mohd Hussein and K Anantham) applied for orders requiring each plaintiff to furnish security for costs. These two summonses formed the subject matter of Civil Appeal No W–03–27–98. On 5 May 1998, the first defendant took out a separate summons seeking identical orders against both plaintiffs. On 5 May 1998, another B partner of the second defendant firm, Mr K Anantham took out a summons also seeking the same order against both plaintiffs. All four summonses were taken by the learned judge at the same time on 13 May 1998. After hearing arguments, he delivered a single judgment in respect of all of them.

C When we commenced hearing these appeals, Mr Abraham of counsel for the second defendant firm moved this court for the admission of further evidence relating to the financial affairs of the first plaintiff. Mr Porres Royan of counsel for Mr K Anantham moved a similar application. Both motions were not opposed and we made an order in terms of them. We also directed that the costs of the motions abide by the event of these D appeals. Whilst the first defendant did not have a formal application before us in this regard, his counsel, Raja Aziz Addruse, sought leave, which was granted, to read the evidence already admitted in the other appeals as part of his case in support of his client's appeal.

Before we proceed any further, it is necessary to say a word or two E about the order the learned judge made on these summonses. In respect of the applications against the first plaintiff, he came to the conclusion that there was no credible evidence to warrant the exercise of discretion in favour of the defendants and Mr Anantham. However, he ordered the second plaintiff to furnish security for costs and accepted a letter of undertaking from the first plaintiff in respect of those costs.

F Before us, it was contended that whatever may have been the position that existed on the evidence that was available to the learned judge, the situation has substantially altered by reason of the further evidence now made available. It was submitted by Mr Abraham (which submission was adopted by counsel for the other defendants) that if this further evidence G had been before the learned judge, he would have exercised his discretion differently.

In order to appreciate the arguments of counsel in support of these appeals, it is necessary to hearken to the statutory provision under which the applications were made. It is s 351(1) of the Companies Act 1965 H which reads:

> Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is I given.

As may be seen; and this is borne out by the authorities decided upon the parallel provisions in other common law jurisdictions; the section provides for a two stage inquiry in the process of arriving at the conclusion as to

whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

A number of authorities were cited to us in which the equipollent of s 351(1) was considered by the courts of the several States of Australia and its Federal Court as well as the courts of England. Most, if not all, these authorities appear in the judgment of the learned judge and we find it quite unnecessary to either refer to them or reproduce passages from them in this judgment. The other Australian authorities upon the subject are collected in the judgment of VC George J (as he then was) in *Gula Perak Bhd v Agri-Projects (M) Sdn Bhd* [1989] 1 MLJ 422. For our part, we are satisfied that the Australian cases, though expressing the test to be applied in different ways, are unanimous in the two stage process to which we earlier adverted.

In our judgment, the correct approach to an application of the nature that forms the subject matter of the appeals before us is that stated by Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 where, at p 626, the Master of the Rolls said:

> I do not think those observations are correct. I prefer to follow the cases which are to be found in the notes in 76 LJ 204 [*Ebury Garages Ltd v Agard*] and 77 LJ 123 [*Gill All Weather Bodies Ltd v All Weather Motor Bodies Ltd*]. Scrutton LJ said that there were too many applications against companies for security for costs. In his view 'the powers of the section should be carefully used'. Maugham LJ said:
>
> > 'The section only confers discretion on the court. There may be many cases where a company is insolvent, and yet the court would not order security to be lodged.'
>
> I would add a case in 1962 in the Supreme Court of Eire. It is *Peppard and Co Ltd v Bogoff* [1962] IR 180. Kingsmill Moore J said, at p 188:
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> > '... the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the court which may be exercised in special circumstances.'
>
> Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.

In our view the Australian authorities, such as they are, in so far as they do not adhere to this approach, are with great respect wrongly decided and do not reflect the true spirit and intendment of the legislature in enacting s 351(1).

It now behoves us to deal with the further evidence placed before us which, as we have already said, according to counsel, turns the balance in favour of the defendants and Mr Anantham. The question is whether there is credible evidence; having regard to the first stage of inquiry; to merit

entering upon the second stage of the inquiry. It is significant that in the arguments addressed to us, counsel dealt with both stages of the inquiry together. To sum up, defendants' counsel and counsel for Mr Anantham submit that there is credible evidence which supports the belief, in the words of the section, 'that the company will be unable to pay the costs of the defendants'. It is of equal signification on that counsel for the plaintiffs has not sought to argue that the further evidence is incredible. What he has said is that when that evidence is considered as a whole, it supports the belief that the first plaintiff can meet an order for costs made against it in the event of its failure in the main action.

We may mention at this stage that the further evidence counsel has addressed us upon includes a letter put in by Mr Abraham this morning, with the consent of all other counsel, as an additional exhibit to the motion paper already before us. That letter is dated 4 June 1998. It is addressed to one of several creditors of a company called MBf Holdings Bhd which is the writer of the letter. It calls upon creditors to stay their hand from enforcing any security and loans pending reconstruction of MBf Holdings Bhd. Counsel has drawn our attention to the fact that the aforesaid company is a 31% (approx) shareholder of the first plaintiff.

Having considered all the arguments and the authorities referred to us by counsel as well as the criticisms levelled against the way the learned judge approached the applications before him, we arrive at the following conclusions:

(1) On the evidence before him, we are of the view that the learned judge applied the correct legal test to the evidence made available to him. We agree with the learned judge's approach to the applications made to him under s 351(1) of the Companies Act 1965. Reading the judgment as a whole, we find no error in the manner in which he exercised his discretion in refusing to direct the first plaintiff to give security for costs and in accepting an undertaking by it to meet the costs of the second plaintiff which is admittedly insolvent.

(2) Taking into account all the qualifications set forth in the annual report of the first plaintiff for the financial year ended 1997 (which is part of the further evidence placed before us) and addressing our minds most carefully to the several criticisms directed against the financial state of the first plaintiff, we are satisfied that if the further evidence had been placed before the learned judge he would have exercised his discretion as he did. In other words, the further evidence does not have the effect of creating a reason to believe that the first plaintiff will not be able to satisfy an order for costs in the event of it failing in the litigation in question.

Having come to the foregoing conclusions, we are left with no alternative but to say that the appeals that deal with the question of security for costs must fail. By way of postscript, we may add that it is not necessary that a company must be readily possessed of cash in order to satisfy a court that it is in a position to pay the costs of an action brought by it in the event of failure. Suffice that the court is satisfied upon credible testimony, that is to

say, evidence that instils belief in the mind of the court after critical examination of it, that a corporate plaintiff is in a position to satisfy an allocatur by attachment upon its assets. For these reasons, Civil Appeal No W–03–27–98, W–02–301–98 and W–03–313–98 are dismissed. The defendants and Mr Anantham must pay the costs of these appeals to the plaintiffs.

However, in view of the fact that these appeals were taken together, and only a single argument was addressed, we direct that a single bill with only one item of getting up be presented in respect of all three appeals. The deposit in respect of the aforesaid three appeals will be paid out to the plaintiffs to account of their taxed costs.

The quantification appeal

Two arguments are advanced by the first defendant in support of this appeal. First, it is submitted that the quantification of general damages in the writ and statement of claim is not in accordance with settled practice and amounts to or borders upon abuse of the court's process. Raja Aziz Addruse has drawn our attention to a passage in 32 *Atkin's Court Forms* (2nd Ed, 1992 Issue) para 33 which reads as follows:

> Particulars of general damages, ie unliquidated or unascertained damages, are not required to be specifically pleaded. On the other hand, if the plaintiff claims that he has suffered damage or injury of a kind which is not the necessary and immediate consequence of the wrongful act, he must plead full particulars of the nature and extent of the damages, and the mere statement or prayer that he claims 'Damages' will not support a claim for such damages.

It is also submitted that if the practice of permitting plaintiffs, especially in defamation cases, to quantify general damages goes unchecked, the courts will be turned into a market place for those who think they are worth more than they really are. At the end of the day, it is the court that makes the determination of the amount which a successful plaintiff ought to receive. This is not just a question of discretion but an important point of principle. So much for the submissions of the first defendant's counsel.

Responding to the appeal, Dato' V Sivaporanjothi says that there are four reasons why the first ground of complaint ought not to succeed. These are:

(1) No provisions of written law or the Rules of the High Court 1980 have been contravened by the plaintiffs in quantifying their claim for liquidated damages.

(2) Contrary to what is advanced by the first defendant, decided cases show that it is not wrong to quantify unliquidated general damages.

(3) There are good reasons for quantifying general damages in defamation cases because it avoids the element of surprise vis a vis an unsuspecting defendant during a trial.

(4) Orders 78 and 22 of the Rules of the High Court appear to call for quantification of damages whenever possible.

A We find it unnecessary to comment upon the merits of all four points raised by the plaintiffs in answer to the first ground advanced by Raja Aziz for striking out so much of the writ and statement of claim as quantified the damages. However, we are very much impressed by a passage in *Odgers on the Law of Libel and Slander* (5th Ed) p 628 which reads:

B

> As the damages are necessarily unliquidated, it is not necessary to insert in the claim of damages at the end of the statement of claim any specific figure as the precise amount claimed (per Vaughan Williams LJ, in *London and Northern Bank Ltd v George Newnes Ltd* (1900) 16 Times LR at p 434), nor is it advisable for the plaintiff to do so. But if he does so, he should be sure to claim enough; for although the plaintiff may recover less than the amount
C specified, he cannot recover more, unless the judge at the trial will consent after verdict to amend the statement of claim under O XXVIII r 1 (*Chattell v Daily Mail Publishing Co Ltd* (1901) 18 Times LR 165).

Although this statement appears in an edition of the work published in 1911, we find the same proposition repeated in another work by the same
D learned author on *Pleadings and Practice* (1981) at p 125. For completeness, we reproduce the passage below:

> In cases of unliquidated damages, it is usual to claim damages 'at large', but if you wish to insert a definite amount, be sure you claim enough, as the plaintiff cannot recover more than the sum claimed on his writ or statement
E of claim, unless the judge gives leave to amend.

We are, therefore, unable to agree with Raja Aziz's submission that there was once a practice of quantifying general damages but that it has since fallen into disuse and that it would be quite wrong to reinstate it. In our judgment, there is no rule of practice going either way. A plaintiff in a
F defamation action may quantify his damages, in which event he runs the risk of not receiving anything more than the amount stipulated in his writ. However, he is equally at liberty not to specify a sum in which event arguments may be addressed in the usual way at the conclusion of the trial upon that issue. In either case, as it is correctly pointed out by Raja Aziz,
G it is the court that makes the determination. We are, therefore, of the opinion that this is not a case which comes within the Delphic pronouncement of Lord Diplock in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 where at p 729 his Lordship said:

> My Lords, this is a case about abuse of the process of the High Court. It
H concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those
I which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

We now turn to the second ground advanced by Raja Aziz. It is that the quantification of general damages in large amounts has the effect of curbing freedom of speech which is a guaranteed fundamental liberty under art 10(1)(a) of the Federal Constitution. Counsel has sought to argue that the restriction in favour of defamation provided in art 10(2)(a) of the supreme law will overshadow or eclipse to the point of extinction the liberty fundamentally guaranteed by art 10(1)(a) if plaintiffs are permitted to threaten defendants in defamation cases with multi-million dollar claims.

With respect, we do not agree. As pointed out by Haidar JCA in the course of argument, freedom of speech is not absolute, and we would add that the reputation of an individual or even a company is as precious as free speech itself. To the argument by counsel that the freedom to criticise which is the quintessential of human rights necessary for the development of an intellectual mind will be stemmed and gagged by a decision of this court in favour of quantification of damages, we would say this: freedom of speech does not include the right to publish lies that injure reputation. Any decision of this court which has the effect of ensuring truth in publication, written or oral, is, in our view, to be welcomed. Parliament has by enacting s 8A of the Printing Presses and Publications Act 1984 made it clear that there should be truth in journalism. In our judgment, courts must keep in tandem with the legislature. We do that by ensuring truth in publication at common law which will be encouraged by permitting the quantification of damages and thereby stop in their tracks would be publishers of false information. Such deterrence is in keeping with the spirit and intendment of art 10(1)(a) and is not contrary to it. Ingenious though the first defendant's argument may be, we must express our inability to accede to it.

For these reasons, we would dismiss the quantification appeal, affirm the order made by the learned judge and award costs of this appeal to the plaintiffs. The deposit paid into court will be paid out to the plaintiffs to account of their taxed costs.

Before we conclude this part of our judgment, we would point out that while the reasons we have expressed may not be identical to those produced by the learned judge in his decision, the conclusion we arrive at is the same. We are conscious of the criticism levelled by Raja Aziz against some of the reasons given by the learned judge for refusing to strike out the quantification of damages in the writ and the statement of claim but we are not satisfied that there is any error in principle.

The particulars appeals

Both the first and second defendants moved for particulars of the plaintiffs' pleadings. The learned judge declined to order particulars. However, he approached the first defendant's application on a different footing from that of the application made by the second defendant firm. For that reason, we are compelled to treat the two applications separately. For convenience, we will first deal with the summons taken out by the second defendant firm. The second defendant's application for particulars is contained in its summons dated 19 September 1997. It was supported by

an affidavit of Mr RS Nathan, an advocate and solicitor but the learned judge did not allow that affidavit to be used in support of the summons. He said that it was undated and therefore out of order. He said no leave had been asked for and obtained from him to use and read the affidavit. According to him, there was therefore no admissible evidence in support of the second defendant's summons, which on that ground was bound to fail in limine. We do not agree with these conclusions.

Whilst it may be necessary in particular cases for an affidavit to be filed in support of an application for particulars, it is not *a sine qua non*. There may be cases where the particulars asked for are so obviously necessary that an affidavit may be superfluous. It all depends on the facts of each case. We are therefore unable to agree with the learned judge that it is a universal rule that for every application for further and better particulars there *must* be an affidavit in support.

But we think there is another reason why we should disagree with the learned judge. The learned judge completely overlooked the fact that there was another affidavit by a partner of the firm, Mr Chin Yoong Chong, filed in opposition to an affidavit in reply by the plaintiffs. That affidavit certainly advanced sufficient reasons why the particulars sought for ought to be had.

In fairness to Dato' V Sivaparanjothi who appeared for the plaintiffs before us in these appeals, we must say that when we made clear our prima facie view on the matter, he at once informed the court that he was not relying upon the technical ground. We must therefore re-examine the second defendant's application according to its merits and simultaneously decide whether the refusal by the learned judge, in the exercise of his discretion, of the particulars sought by the first defendant ought to be upheld.

As the argument proceeded, it became clear that some of the particulars were patently necessary and relevant. They were indeed conceded by counsel for plaintiffs before us. We therefore allow, upon the concession of the plaintiffs' counsel, the particulars sought by the second defendant firm under para 2 of the amended reply which are as follows:

A Of: 'Since at least two partners of the second defendants (Mr Tommy Thomas and Mr K Anantham) had actively and jointly contributed to the publication of the said article, the plaintiffs will contend that the second defendants did in fact make it their business to talk to the representative or representatives for the magazine about the business or conduct of the plaintiffs and their solicitors and counsel.'

(1) State without equivocation whether it is or is not the plaintiffs' case that any partner of the second defendant other than Mr Thomas and Mr K Anantham 'actively and jointly contribute to the publication of the said article'.

(2) If it is so alleged, state:

(a) which other partner or partners of the second defendant actively and jointly contributed;

(b) precisely how each such partner contributed to the publication of the article.

(3) State precisely what contribution it is alleged that Mr Anantham made to the article. A

The fourth particular sought under that paragraph was not seriously pursued by Mr Abraham and we therefore affirm the order made by the learned judge in respect of that request.

The second set of particulars sought by the second defendant firm is under para 6 of the amended reply. Once again upon the concession of plaintiffs' counsel, we allow the particulars sought under this paragraph which are as follows: B

B Of: 'The plaintiffs also allege that the second defendants are vicariously responsible for the malice of the first defendant who was actuated by malice, for which malice the second defendants are vicariously liable.' C

(1) State whether these particulars are to be read as supporting the claim for damages pleaded in para 14 of the statement of claim (which appears to allege malice against the second defendant firm) or, if not, to what issue in this action this paragraph is directed. D

The final set of particulars are those under para 9 of the amended reply which read as follows:

C Of : '... the magazine is available on sale to the general public at all material times ... The second defendants were also aware of the significant global readership and influence ... . E

State precisely where the magazine is available on sale to the general public within the jurisdiction; identifying by name and address any shop or other distribution outlet relied on.

(2) State which partners of the second defendant allegedly knew as at the time when the alleged slanders were published: F

(a) that the magazine was on sale to the general public;

(b) that the magazine had significant global readership and influence;

(c) how, when and from whom each such partner acquired knowledge of the matters referred to in (a) and (b) above.

This request was vigorously pursued before us as it was before the learned judge and resisted with equal vigour. At the heart of the dispute between the parties lies the well established principle that governs the law of particulars in the field of practice and procedure. It is this. A litigant is entitled to have from his opponent, particulars of facts relevant to the issues at stake in order to prevent surprise, but he is not entitled to have his opponent's evidence. G H

The second defendant contends that the aforesaid request under para 9 of the amended reply is fact-based. The plaintiffs say that it relates to evidence. Whether it is of the one class or the other depends upon the application of the principle to the particular facts of each case. After carefully considering the allegations in the statement of claim, the defence of second defendant and the amended reply, we are satisfied that the particulars sought under para 9 do indeed relate to matters of evidence. I

The point we think is adequately covered by the following passage in *Gatley on Libel & Slander* (8th Ed) para 1325:

> At the trial of an action for defamation, the plaintiff may show the mode and extent of the publication with a view to the amount of damages. For example, he may show that the libel was published in a newspaper when the defendant was under no duty to publish it except to a limited number of persons. If the libel is published in a newspaper, the plaintiff may give in evidence the extent of the circulation. 'Surely the proprietor of a newspaper, with a very large circulation, is to be visited with larger damages for a libel published in it than one of a more limited circulation.' So evidence that copies of the paper containing the libel have been industriously circulated in the neighbourhood in which the plaintiff resides is admissible to show the extent of the circulation of the paper and the consequent injury to the plaintiff.

This passage appears to support the contention advanced by the plaintiffs that matters relating to circulation are evidential and not fact-based. Since the particulars fall outside the permitting rule or principle, they cannot be had. So far as the second defendant firm's appeal is concerned, it is allowed to the extent earlier indicated. The order of the learned judge is varied to that extent. In accordance with agreement of counsel, there will be no order as to costs upon this appeal and on the second defendant's summons in the court below. The second defendant will have the deposit lodged in court refunded to them.

That brings us to the appeal of the first defendant. Here the learned judge refused particulars on the ground that there had been delay in applying for them. Whilst delay is a relevant consideration in a case such as this, it is not the sole determining factor. If particulars are relevant and no injustice results in ordering them, then they must be had. That we think holds true in this case. It must not be forgotten that this is an action which was subjected to case management. The plaintiffs and defendants had therefore to organise their cases periodically through the management process. The delay in the present case cannot be described as inordinate, and even if it was, it certainly did not result in any injustice. We therefore do not agree with the learned judge on this ground.

Of the particulars requested, we allow the following asked for under para 9 of the statement of claim amended before us as indicated by the underlining.

(1) Of '... authorized ...':

> State whether the alleged authorization was oral or in writing or by conduct; if oral, state the date, time and place thereof, to whom the authorization was given and the words alleged to have constituted the authorization; if in writing state every document in which it is alleged that the authorization was embodied.

The following particulars were all resisted in the court below and before us.

Request for further and better particulars of the statement of claim:

Under para 9

(2) Of '... intended ...':

State every overt act of the first defendant and all other acts and state every documents relied upon to show that the first defendant had the alleged intention.

(3) Of ' ... knew ...':

State every specific fact, document, overt act and other act relied upon to show that the first defendant had the alleged knowledge.

(4) Of ' ... natural and probable consequence ...':

State every specific fact, document, overt act and other act relied upon to show the natural and probable consequence alleged.

(5) Of ' ... a leading magazine about commercial litigation ...':

State every fact relied upon as to how and why the magazine is alleged to be a leading magazine about commercial litigation.

(6) Of '... an extensive and influential distribution within the jurisdiction of this honourable court.'

6.1 State the extent of the distribution, the number of copies of the magazine distributed in West Malaysia for the past three years preceding the November 1995 issue for the magazine, the number of copies of the November 1995 issue of the magazine actually distributed in West Malaysia, the persons to whom they were distributed; if distributed to magazine vendors, state the name and address of each magazine vendor, the number of copies distributed to each of them and the number of copies actually sold by such magazine vendors; and

6.2 State every specific fact relied upon to show that the magazine is influential as alleged and how and in what manner the magazine is influential.

Under para 14(3)

(8) Of '...the defendants knew that the allegations complained of herein were false...':

8.1 State every specific fact, document, overt act and other act relied upon to show that the first defendant had the knowledge alleged; and

8.2 State every specific fact as to why or how the alleged allegations complained of were false.

Under para 14(4)

(9) Of '... knowledge and intention ...':

9.1 State every specific fact, document, overt act and other act relied upon to show that the first defendant had the alleged knowledge; and

9.2 State every overt act of the first defendant and all other acts and all documents relied upon to show that the first defendant had the alleged intention.

Under para 14(5)(a)

(10) Of '... in the knowledge that the nature of their wholesale attack on their successful rivals, namely Dato VK Lingam and his firm, VK Lingam

A & Co, would or was likely to result in serious damage to those rivals, to their rivals' relationships with their clients and to those clients themselves:'

10.1 State every specific fact, document, overt act and other act relied upon to show that the first defendant had the alleged knowledge;

B 10.2 State the nature of the serious damage to the plaintiff and to the plaintiff's clients, naming specifically the plaintiff's clients;

10.3 State the actual damage suffered by the plaintiff (if any) and the extent of such damage; and

10.4 State the actual damage suffered by the plaintiff's clients (if any) stating the identity of such clients.

C

Under para 14(7)

(11) Of '... having calculated that they stood to gain more, ...':

11.1 State the nature and basis of the alleged calculation and state specifically in what form or manner and to what extent the

D defendants stood to gain more;

(12) Of '... the serious and possible fatal damage that they might thereby cause to Dato' VK Lingam and his firm VK Lingam & Co ...':

12.1 State the nature, form and extent of the alleged serious and fatal damage.

E

Request for further and better particulars of the amended reply to defence of the first defendant

Under para 5.1

(13) Of '... the first defendant was actuated by bad faith and/or malice...'

F 13.1 State every fact, overt act and other act relied on to support the bad faith and/or malice alleged.

Under para 7

(14) Of '... the first defendant was actuated by bad faith and/or malice...

G 14.1 State every fact, overt act and other act relied on to support the bad faith and/or malice alleged.

Raja Aziz has argued that he is entitled to the foregoing particulars because they relate to the state of mind alleged against his client. He says that whenever a plaintiff or a defendant pleads intention or knowledge on the

H part of his opponent, he must give full particulars of the facts that constitute such knowledge or intention, or from which such knowledge or intention may be inferred. The general principle appears in paragraph 18/12/7 at p 311 of the *Supreme Court Practice 1997* (Vol 1):

> If an allegation is made that a person, including a party, had or did not have
> I a particular intention, particulars will be ordered of any overt acts and any other facts relied on to support the allegation.

The same commentary in para 18/12/9 at p 312 has this to say about an averment of a litigant's knowledge.

> Where knowledge is pleaded as a fact, particulars of the facts on which a party relies in support of such allegation may, but need not, be contained in the pleading itself, but such particulars should be given on request or the court may order them to be given. The usual form would be, particulars of specific facts, documents or overt acts on which a party intends to rely in support of the allegation that the other party had knowledge of some fact, matter or thing.

Raja Aziz also argues that it is also no answer for the plaintiffs to contend that the facts of which particulars are sought are within the first defendant's peculiar knowledge and cites the following passage in the judgment of Stable J in *Palmos & Anor v Georgeson* [1961] Qd R 186 at pp 191–193:

> Order 22 r 1, states, in effect, that a pleading must set out the material facts upon which the party pleading relies to support his claim or defence, as the case maybe, but not the evidence by which they are to be proved. The defendant complains that all he has been given in para 3 of the statement of claim is an inference and not material facts. He argues that in such circumstances, the pleading is defective so that, in the absence of an application for it to be struck out, an order for particulars becomes a matter of right: *Bruce v Odhams Press Ltd* ([1936] 1 KB 697 at pp 712–723; [1936] 1 All ER 287 at pp 294–295). Alternatively, the defendant argues that he is entitled to particulars in an exercise of my discretion. As to this latter aspect, see the judgment of the Full Court of NSW in *Phillipponi v Leithead* ([1959] 59 SR (NSW) 352 at p 358):
>
> > 'The principles upon which the court exercises its discretion are well settled. In *Spedding* v *Fitzpatrick* ([1888] 38 Ch D 410 at p 413), Cotton LJ said "The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise".
>
> This statement has been adopted and acted upon for many years. It must also be kept in mind that the function of particulars is not to enlighten a party as to the true facts of the case. It is to let him know what case he will have to meet and to enable him to know what evidence he ought to be prepared with. It is with this function in mind that the question must be decided in any individual case, whether it is a case in which particulars ought to be furnished: *Atkinson v Stewart and Partners Ltd* ([1954] LR N Ir 146 at p 170) per Black LJ; *Elkington* v *London Association for Protection of Trade* ([1911] 27 TLR 329 at p 330). During the last century, it is apparent that the approach of the courts to any question as to whether particulars should be furnished or not has undergone an appreciable change. With the passage of the years, the tendency has been to abandon the narrow view which may be detected in the earlier cases and to be more liberal in such matters. It is most probable that this is merely one facet in the evolution of our rules of procedure which have in modern times developed in a way so as to ensure, as far as is practicable, that proceedings between parties will result in a determination of the rights of the parties according to law and to limit if not eradicate, the number of cases in which technicalities can cause the proceedings to miscarry. Generally speaking, justice will be more readily and speedily attained if each party is fully aware of the precise nature of the allegations made by the other.

These remarks I accept as being of general application notwithstanding differences in State procedures, and I respectfully adopt them for the

purposes of this decision. Each case is an individual case, and in each case a party is entitled to know what case he will have to meet so that he can be prepared to meet that case. *Odgers on Pleading and Practice* (1960) (17th Ed) p 158, also mentions that particulars are now ordered much more freely than in former days.

As against this, it was submitted for the plaintiff that the defendant, being in occupation of the demised premises, could see the damage with his own eyes. That appears to me to be no answer, for that vision does not tell him what out of all he can see is going to be relied upon what he has to meet. *Odgers* at p 163 expresses it thus:

> It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary will try to make against him, which may be something very different from the true facts of the case.

The same idea was expressed by Taylor J in *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228 at p 229 where it is said that applications for particulars are not so much concerned with the applicant's knowledge of or belief as to the relevant circumstances as with the particular issues which the plaintiff intends to raise. See also 10 *Encyclopaedia of the Laws of England* at p 346:

> There is, however, no doubt that particulars will be given of matters within the knowledge of the applicant, where they are necessary to enable him to understand that nature of his opponent's case.

The general principle whilst easily stated causes difficulty when applied to facts of particular cases. Whether it be a libel action or a suit based on any other cause of action, it depends on the facts and circumstances, and especially the joinder of issues raised in each case. Having given the matter our most careful consideration, we are satisfied that on the issues pleaded, by the plaintiffs in their statement of claim and amended reply and by the first defendant in his defence, even in its unamended form, the particulars sought relate to evidence and not to facts.

This is not a case, it must be remembered, where the plaintiff has put his own state of mind in issue as was done in *Feeney v Rix* [1968] Ch 693. This is a case where the first defendant's intention and state of knowledge is put in issue in the context of allegedly defamatory statements made by him to a journalist. What moved him to say what he did, and the attendant circumstances relevant to that issue, must in the circumstances of this case, be undoubtedly matters of evidence within the knowledge of the first defendant himself. At the end of the case, when all the evidence has been gathered before the judge, all that the plaintiffs can do is to make a submission on the proved facts and to invite the court to draw inferences as to the first defendant's state of mind.

When viewed from this perspective, it is clear that the particulars sought by the first defendant may not be had. The learned judge was right in refusing them. We agree with him. The first defendant's appeal must be dismissed. He must pay the costs of this appeal. The deposit lodged in court shall be paid out to the plaintiffs to account of their taxed costs.

The preliminary issues appeals

Dato Ranita's application

Dato Ranita Hussein, it is argued, was not a partner of Messrs Skrine & Co when the alleged defamatory words were spoken by the first defendant. She is therefore not liable vicariously or otherwise for the alleged tort. She must accordingly be removed from the suit. In order to achieve this, a short hearing — which probably envisages oral evidence — needs to be held. This is the most convenient way in which her plea, which is one taken under O 77 r 4(4), may be determined. The judge was wrong in refusing her application because he adopted the wrong approach and asked himself the wrong questions. These are the arguments of Mr Abraham in support of Dato' Ranita's appeal.

With respect, we do not think that the matter is as clear cut as counsel perceives it to be. Order 77 r 4(4) of the Rules of the High Court 1980 which provides that:

> The Court may at any stage of the proceedings in an action in which a defendant has entered an appearance in accordance with para (2), on the application of the plaintiff or of that defendant order that any question as to the liability of that defendant or as to the liability of the defendant firm be tried in such manner and at such time as the Court directs,

obviously reserves in a judge a discretion as to the manner and the time at which an issue upon a partner's liability may be separately determined. The learned judge who heard the application is in the best position to determine how conveniently the trial should be proceeded with. It is a matter upon which individual judges may differ. It is wrong to think that the paramount consideration is Dato' Ranita's inconvenience. It is not. It is the inconvenience which would be caused to all parties that is relevant. Above all, it is for the trial judge to determine how and when issues ought to be tried; whether as preliminary matters or together with the main action.

We are therefore not inclined to disturb the decision of the judge. Indeed we agree with him that it will be most inconvenient to have the trial conducted in bits and pieces. We affirm the order made and dismiss the appeal. With the agreement of counsel for the plaintiffs, there will be no order as to costs. The deposit in court is to be refunded. The order for costs in the court below will remain.

The second defendant's application

In fairness to Mr Abraham, he recognized the grave difficulty that stands in the way of his succeeding in this appeal which relates to the second defendant firm's application to have the question of its alleged vicarious liability tried as a preliminary issue.

Counsel, however, has very properly drawn our attention to certain passages in the judgment which may be interpreted as being conclusive

findings upon the issue of vicarious liability. We think the confusion arises because of the decision of this court in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57. We must say at once that the learned judge has unfortunately misunderstood the true effect of that case. That was a case where the trial judge was faced with an objection as to the form of proceedings before him. Initially, he came to the conclusion that the form chosen by the applicants in that case was regular. However, upon the point being re-agitated in the same proceedings, he changed his mind, altered his order and held the proceedings to be bad in form. It was in that context that this court made the following observation (at pp 66–67 of the report):

> We cannot over emphasise the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in [*Harrison v Harrison* [1955] 1 Ch 260]? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

However, it must be said in fairness to the learned judge, that he made it plain that the issue of vicarious liability was not one upon which he had made a final decision and that the issue was available for full ventilation at the trial. By reason of the way in which counsel for second defendant approached this appeal, we found it unnecessary to call upon counsel for the plaintiffs to respond. We dismiss the appeal. However, on the question of costs, we cannot help but feel that the issue on liability may have been construed to have been closed, and that clarification from this court was therefore necessary. We accordingly direct that any finding on the liability of the second defendant firm in the judgment of the learned judge shall not bind the parties at the trial of the action in the court below.

We would therefore, in the exercise of our discretion, decline to order costs. We would, therefore, affirm the order of the learned judge. There will be no order as to costs here and the deposit will be refunded to the second defendant firm.

The amendment and interrogatories appeals

The amendment

It has been argued by the plaintiffs, upon whom we called to say why the appeal should not be allowed, that the judge was right in refusing the amendments sought by the first defendant. We have examined the learned judge's reasons which counsel for plaintiffs says are correct. The judge seems to have approached the amendments upon the footing that it introduced a new case. Indeed, that was the complaint of the plaintiffs in

the court below and before us. We do not agree with either counsel or the learned judge. We think they are wrong. The amendments do not introduce any new plea. They merely explain or expand within permitted limits the case already pleaded by the first defendant. In this context, we would refer to the speeches of Lord Brandon and Lord Griffiths in *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] AC 189. Lord Brandon, at p 212 of the report, said:

> With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC O 20 r 5, in *The Supreme Court Practice 1982* and to the authorities there cited. The effect of these authorities can, I think, be summarized in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

Lord Griffiths said (at p 220):

> ... whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.
>
> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be

A better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

We realize that this is an appeal against the exercise of discretion. But we think the discretion was wrongly exercised because the judge did not B appreciate the true nature and scope of the proposed amendments.

The appeal must be allowed. The first defendant must deliver his amended defence within 10 days from today. The plaintiffs will be at liberty to amend their pleadings if necessary.

We now come to the question of costs. Raja Aziz Addruse has argued C that his client ought to have had the amendments in the first place. We agree with him. But, if that had happened, his client would have had to pay the costs. The fact that he succeeds in this appeal does not put him in a better position as far as costs are concerned. We have examined the decisions of the English Court of Appeal in four unreported cases made available to us by counsel for the plaintiffs. They are *Kalvin Cader Mackenzie* D *v Business Magazines (UK) Ltd & Ors* (CA, 18 January 1996), *Carmen Proetta v Times Newspapers Limited* (CA, 27 February 1991), *Thomas Michael Bower v Ian Robert Maxwell* (CA, 8 May 1989) and *Edelman v Times Newspapers Limited & Anor* (CA, 17 January 1991).

We do not agree with Raja Aziz that the rule in those cases should not E be applied here. Counsel says there was no delay in applying for the amendment. Again we do not agree. The facts relevant to the question of delay and lack of bona fides of the first defendant's application have been dealt with by the learned judge in his judgment and we do not propose to deal with them here.

F Late amendments must always be discouraged. We will follow the practice adverted to in the English cases. Although the appeal succeeds, the plaintiffs will have all the costs occasioned by the amendment to be taxed and paid forthwith. The deposit in court will be paid out to the plaintiffs to account of taxed costs.

G The interrogatories

With that, we now turn to the last appeal which is in respect of the interrogatories allowed by the learned judge to be administered by the plaintiffs to the first defendant. Again, the question has arisen as to H whether all the interrogatories are admissible.

Raja Aziz agrees that interrogatory No (1) administered in respect of para 4(1) of the statement of claim is admissible. The order of the judge to that extent is affirmed. The other interrogatories, all of which appear sufficiently in the learned judge's judgment, are contended to be improper. Counsel for the first defendant argues that they do not fall within the I principle stated in *The Supreme Court Practice 1997* (Vol 1) para 26/1/10, p 483:

> In an action for slander, the plaintiff may interrogate the defendant as to whether he did not on or about a given date, or when, speak the words complained of, 'or words to that effect'.

In supporting the judgment of the learned judge, Dato' VK Lingam has referred us to the decision of the Court of Appeal in the locus classicus upon the subject, *Dalgleish v Lowther* [1899] 2 QB 590. The headnote to that case reads:

> In an action for slander, the plaintiff administered the following interrogatories to the defendant:
>
> 'Did you on or about the first of March, or when, speak the following words of the plaintiff' (setting out the words alleged in the statement of claim to have been spoken by the defendant of the plaintiff), 'or words to that effect?'
>
> 'Were the said words spoken in the presence of' (two persons named in the statement of claim), 'and other persons, or any and which of them?'
>
> Held, that these were proper interrogatories, and that the defendant must answer them.

After considering the rival contentions, we are in agreement with the submission of counsel for the plaintiffs. Taking into account the amendments, we have permitted to the first defendant's defence, the interrogatories sought are not only desirable but have become essential. The learned judge was correct in ordering them. We agree with him. We affirm his order. The appeal is dismissed. The costs of this appeal and in respect of the application in the court below will abide by the event of the trial. The deposit in court shall be refunded to the first defendant.

Conclusion

We have thus far disposed of all the appeals argued before us these past three days. When we began this judgment, we mentioned that some of these appeals had to do with the exercise of discretion by the judge at first instance. We have demonstrated that this is indeed the case. In dealing with those appeals where discretion is concerned, we have borne in mind, the principles set out in one of the judgments of this Court in *Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal* [1995] 2 MLJ 620 at pp 637–638:

> The next point that falls to be considered is whether discretion ought to be exercised in favour of the appellants. Before dealing with this aspect of the case, it is necessary to state the principles on which this court will interfere with a decision of the High Court arrived at in the exercise of a discretion vested in it. In an appeal such as the present, where relief is granted or withheld in the exercise of discretion, the initial function of the Court of Appeal is one of review only. It is only after an appellant has demonstrated to a conviction that the High Court erred in principle or that it took into account irrelevant considerations or failed to take into account relevant considerations or that the decision has occasioned a miscarriage of justice that this court becomes seized of an original discretion of its own.

We have in adjudging these appeals adhered to these principles. We have intervened when intervention has been called for. We have declined intervention in cases which have fallen outside the principles aforestated.

A We cannot but thank all counsel who appeared before us for their careful and well researched arguments. This oral judgment has been made possible by reason of the high quality of advocacy to which we have been entertained. We will now hear arguments on stay.

Court: After hearing arguments we make the following orders:

B (1) High Court trial stayed for a further three months;

(2) the trial judge is hereby directed to fix trial dates, if possible, in October 1998; and

(3) there shall be no stay in respect of the orders for costs.

C *Order accordingly.*

Reported by Loo Lai Mee

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